Filed 3/30/05 P. v. Rodriguez CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR GARCIA RODRIGUEZ, Defendant and Appellant.	F042248 (Super. Ct. Nos. 88655 and 72356) **O P I N I O N**

APPEALS from judgments of the Superior Court of Tulare County. Melinda M. Reed, Judge.

Marisa Nayfach, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna, Michelle L. West, Louis M. Vasquez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION AND GENERAL FACTS

Appellant, Salvador Garcia Rodriguez, has a history of alcohol-related crimes dating back to 1989. Most recently, he was arrested for drunk driving on four separate occasions in a 14-week period: November 16, 2001, January 21, 2002, February 7, 2002, and February 28, 2002. Ultimately, he was convicted of 13 offenses and numerous special allegations were found true. He was sentenced to an aggregate term of five years' imprisonment.[1]

Appellant raises a technical challenge to the pretrial proceedings, and contests his sentence on *Blakely*-related grounds (*Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*)). None of his arguments are persuasive. We will affirm.

DISCUSSION

I. The trial court properly denied appellant's Penal Code section 995 motion; the ineffective assistance claim must be pursued through the habeas corpus process.[2]

A. Facts.

Initially, a separate case was filed for each of the first three drunken driving incidents. Charges arising from the February 28 incident were brought later in a fourth case.

As relevant here, a four-count information was filed charging defendant with crimes arising from the February 7 incident. This particular case was dismissed on March 13, 2002, because the prosecutor was unable to proceed. Later that day, the same charges were refiled.

The three cases arising from the November 16, January 21 and February 7 incidents were scheduled for preliminary hearing on March 27, 2002 (the hearing). At the outset of

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1 The underlying facts of the offenses are irrelevant to the issues raised on appeal. Relevant procedural facts will be set forth in our discussion of the appellate issues. The four incidents of drunk driving will be referenced by date of occurrence.

2 Unless otherwise specified all statutory references will be to the Penal Code.

the hearing, the court offered defendant an indicated sentence of no more than two years' imprisonment in exchange for a guilty plea. Against the advice of his attorney, appellant rejected the court's offer. The court announced that the three cases would be consolidated for trial.

Immediately thereafter, the court held an unreported discussion with counsel at the prosecutor's behest. At the conclusion of this discussion, the court announced that the case arising from the February 7, 2002, incident "is dismissed."

Preliminary hearing on the other two cases commenced. The first witness was sworn. Before he could state his name, the court interjected, "Hold it. Hold it." Defense counsel stated, "My client is asking me a question, what this is all about. I think I should let him know what this is." The court replied, "Let him know this is his preliminary."

The court held another unreported discussion with counsel. Immediately thereafter, defense counsel stated in open court, "My client is indicating that he wants some time, is willing to waive time at this point in time. [¶] I understand that the [witness] is right here on the stand and has been sworn. [Appellant] wants to think about the --" The court replied, "Well if he is willing to waive time then I am not dismissing that other case." The prosecutor stated, "People would join in a continuance with that agreement." Defense counsel asked appellant, "Do you want to do that?" Appellant answered, "I need some time." Defense counsel stated, "All right. They are willing to continue your three cases so you can think about it. Are you agreeable to that?" She continued, "Do you want to continue your cases? The judge needs to know this right now." Appellant answered, "Yes, I need to think about it."

At this point, the court asked appellant the following questions: "[Y]ou have three cases before me today. One of these cases the District Attorney is not ready to go on and I am prepared to dismiss that case. That is a felony case. But if you are ready -- if you want to put this matter over I am not going to dismiss that case. We are going to go forward. We will continue that case along with the other ones. Are you aware of that?" He

answered, "I need to think about it a little more." The court asked, "So you are agreeing to put this matter over?" He answered, "Yes."

The minute order for the hearing indicates all of the following: (1) the case relating to the February 7 incident was dismissed; (2) the "[c]ourt set aside [the] dismissal"; and (3) the matter was continued to April 10, 2002.

On June 13, 2002, a consolidation motion was granted and an 11-count amended information in case number 88655 was filed charging appellant with crimes arising from the first three drunken driving incidents.

On June 19, 2002, appellant filed a motion pursuant to section 995 to dismiss the four counts arising from the February 7 incident on the ground that they had been dismissed twice previously, within the meaning of section 1387 (the section 995 motion).

The section 995 motion was heard on June 20, 2002. At the outset, a stipulation was reached concerning the contents of the two unrecorded discussions during the March 27 hearing. During the first unrecorded discussion the prosecutor "asked for a continuance of the cases because of witness problems." Defense counsel objected and the court indicated that he was going to dismiss the case. During the second unrecorded discussion defense counsel asked the court if it would entertain a continuance so that appellant could consider the indicated sentence. The prosecutor asked "for the case[] not to be dismissed if they were going to grant a continuance because that's what [she] wanted in the first place." Counsel agreed that the case "was not going to be dismissed but instead the Judge would grant [a] continuance."

After argument, the section 995 motion was denied. The court reasoned, "a magistrate in these set of circumstances has the discretion to void what he had said earlier … this was an ongoing process …, and we can't look at what occurred on page three [of the reporter's transcript] in isolation but … you'd have to look at the totality of the circumstances, so I don't find that there was, in essence, truly a dismissal of the case …."

On July 1, 2002, appellant accepted a plea agreement for the consolidated case arising from the November 16, January 21 and February 7 incidents with a 16-month indicated sentence. He pled no contest to five charges. Appellant later withdrew his no contest pleas because the court increased the indicated sentence to 32 months.

B. The section 995 motion was properly denied.

Appellant argues, as he did below, that the words "the case is dismissed," are immutable and constitute an irrevocable dismissal. He contends that the court did not have the authority to reconsider this decision during the hearing, notwithstanding defense counsel's negotiated agreement that the case arising from the February 7 incident would not be dismissed in exchange for a continuance and appellant's personal acceptance of this bargain. Since the case arising from the February 7 incident also was dismissed and refiled on March 13, 2002, he asserts that prosecution of the case is barred by section 1387.[3]

We reject appellant's premise and his conclusion. As will be explained, the court had inherent equitable power to reverse its original ruling on the dismissal question. Consequently, section 1387 is no bar to prosecution of the case.

Neither party addressed the applicable standard of review. Since the factual questions surrounding the unreported discussions were resolved by stipulation, the lower court did not resolve any factual disputes. "Accordingly, as this matter presents exclusively a question of law, we review the trial court's ruling de novo." (*In re Alberto* (2002) 102 Cal.App.4th 421, 426 (*Alberto*).)

People v. Castello (1998) 65 Cal.App.4th 1242 (*Castello*), cogently explains the relevant legal principle. "A court's inherent powers are wide." (*Id*. at p. 1248.) And "[i]n

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[3] Subdivision (a) of section 1387 provides, in pertinent part: "An order terminating an action pursuant to this chapter, or Section 859b, 861, 871, or 995, is a bar to any other prosecution for the same offense … [when] the action has been previously terminated pursuant to this chapter, or Section 859b, 861, 871, or 995 …."

criminal cases there are few limits on a court's power to reconsider interim rulings." (*Id*. at p. 1246.) Our "Supreme Court has often recognized the 'inherent powers of the court … to insure the orderly administration of justice.'" (*Id*. at p. 1247.) Although "[s]ome of the court's inherent powers are set out by statute,… the inherent powers of the courts are derived from the Constitution and are not confined by or dependent on statute." (*Id*. at pp. 1247-1248.)[4]

Trial courts are conferred with such broad inherent powers because "[a] court could not operate successfully under the requirement of infallibility in its interim rulings. Miscarriage of justice results where a court is unable to correct its own perceived legal errors, particularly in criminal cases where life, liberty, and public protection are at stake. Such a rule would be '"… a serious impediment to a fair and speedy disposition of causes …." [Citations.]' [Citation omitted.]" (*Castello, supra*, 65 Cal.App.4th at p. 1249; see also *Alberto, supra,* 102 Cal.App.4th at pp. 426-427.)

Thus, in *Castello, supra*, 65 Cal.App.4th 421, the reviewing court had no difficulty in concluding "that neither limitations imposed on motions for reconsideration in *civil* cases (see Code Civ. Proc., § 1008) nor any other rule precluded the trial court from reconsidering its previous ruling that a prior Florida conviction qualified under the 'Three Strikes' law." (*Alberto, supra*, 102 Cal.App.4th at p. 426.)

Similarly, in *People v. Rose* (1996) 46 Cal.App.4th 257, this court concluded that trial courts may reconsider their rulings on new trial motions until jurisdiction is lost. (*Id*. at pp. 263-264.)

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4 Resolution of this issue does not require us to determine whether Code of Civil Procedure section 128, subdivision (a)(8), confers upon trial courts statutory power to reconsider and reverse their own rulings on grounds other than clerical error. The Attorney General cites cases invoking this section as a source of such judicial power. (See, e.g., *People v. Eggers* (1947) 30 Cal.2d 676, 692; *People v. Beasley* (1967) 250 Cal.App.2d 71, 77.) However, this is a debatable position. (See, e.g., *Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 148; *Baske v. Burke* (1981) 125 Cal.App.3d 38, 44.)

This is not a recently recognized principle of jurisprudence. In *De la Beckwith v. Superior Court* (1905) 146 Cal. 496 our Supreme Court recognized: "It is a most common occurrence for a trial court to change its rulings during the progress of a trial, upon questions of law, and no one would contend that it is not within its power to do so, or that it should not do so when satisfied that the former ruling was erroneous." (*Id*. at p. 499.)

Applying this principle, we conclude that the lower court possessed the inherent authority during the hearing to reconsider its initial decision to dismiss the case arising from the February 7 incident. It had discretion to accept the negotiated agreement between counsel that the case would not be dismissed in exchange for a continuance giving appellant time to consider whether or not he should accept the previously offered plea bargain. Once the dismissal was set aside, it had no force for purposes of section 1387. Therefore, it follows that the court properly rejected the section 995 motion because it was premised on the fallacious position that the court's initial determination on the dismissal question could not be reconsidered or reversed. Since the case was not twice dismissed, section 1387 did not bar its prosecution.

C. The ineffective assistance claim must be pursued through the habeas corpus process.

In his opening brief appellant argues, "should this court find the reinstatement of charges proper due to appellant's waiver or consent, defense counsel rendered ineffective assistance in acceding to the reinstatement and failing to press for dismissal of the charges with prejudice pursuant to section 1387. [Capitalization omitted.]" The Attorney General did not argue waiver or consent and we have not reached such a conclusion. Nonetheless, in an excess of caution, we will explain why any claim that defense counsel was ineffective at the hearing must be pursued through the habeas corpus process.

It is established that ineffective assistance claims must be pursued through the habeas corpus process if the challenged course of conduct resulted from an informed tactical choice within the range of reasonable competence. Even when the record does not

explicitly show the reason for the challenged action or inaction, the conviction will be affirmed unless there simply could not be a satisfactory explanation for the conduct. (*People v. Pope* (1979) 23 Cal.3d 412, 425-426.)

Defendant fails to acknowledge an obvious tactical reason for defense counsel's decision to allow the case involving the case arising from the February 7 incident to proceed in exchange for a continuance. It provided counsel with an additional opportunity to explain the benefits of accepting the court's generous plea offer and gave appellant a period of time to reflect on the risks involved in rejecting the offer. When appellant refused the court's offer of a maximum two-year indicated sentence, his counsel stated, "I just want on the record that I have advised him of his rights and consequences and his defenses and it is over my advi[c]e that he is fighting this case." Defense counsel appears to have used the continuance period wisely because she improved upon the court's initial offer and obtained a 16-month "lid" for appellant.

Appellant argues that the three cases had not yet been consolidated and therefore counsel could have refused to continue the case arising from the February 7 incident while acceding to a continuance in the other two cases. This contention overlooks the reality of the situation. Appellant's assumption that the court would have agreed to a dismissal of the case plus grant of a continuance ignores four important facts: (1) defense counsel was the party requesting the continuance at this point because appellant wanted time to consider the plea offer; (2) the prosecutor opposed grant of a continuance unless the dismissal was vacated; (3) earlier in the hearing the court had denied the prosecutor's request for a continuance because defense counsel objected; and (4) when defense counsel told the court that appellant wanted a continuance, the court immediately replied, "Well if he is willing to waive time then I am not dismissing that other case." Furthermore, the court had already informed the parties that the three cases were going to be consolidated for trial. These facts all support the position that the court would not have agreed to dismiss the case *and* grant a continuance.

We therefore conclude that the record shows that defense counsel's course of conduct could have resulted from an informed and legitimate tactical choice within the range of professional competence. We would be second-guessing if we attempted to definitively rule in the absence of explanation from defense counsel. Therefore, this claim must be pursued through the habeas corpus process. (*People v. Haynes* (1980) 104 Cal.App.3d 118, 123-125.)

II. Consecutive sentencing and imposition of the upper term did not infringe appellant's jury trial right.

As relevant here, the upper term of three years' imprisonment was imposed for count 2. Three reasons were given for this sentencing choice: (1) appellant's prior convictions are numerous and include six prior convictions for driving under the influence of alcohol; (2) he was on probation when he committed the offense; and (3) the offense is a serious danger to society. The court recognized that appellant could be an alcoholic but it concluded this mitigating factor warranted "very little weight" in light of appellant's numerous prior alcohol-related convictions. Eight-month consecutive terms were imposed for counts 5 and 9 (one-third the midterm). The court selected consecutive sentencing because the offenses were separate and appellant had placed the community in "extreme danger."

A. *Blakely* does not apply to consecutive sentencing.

Apprendi v. New Jersey (2000) 530 U.S. 466 (*Apprendi*) held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. (*Id*. at p. 490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely, supra,* 152 U.S. ___ [124 S.Ct. at p. 2537].)

The *Blakely* rule does not apply to the determination to impose consecutive terms. This choice is made only after the defendant has been found guilty of separate crimes beyond a reasonable doubt. No "statutory maximum" is violated if the defendant serves his terms consecutively. Unlike section 1170, s subdivision (b), the statute governing consecutive sentencing has no provision mandating concurrent terms in the absence of aggravating factors. (§ 669.) Thus, a defendant who commits separate crimes has no legal right to concurrent sentences--"and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2540].)

Consecutive sentencing does not result in a usurpation of the jury's fact-finding powers provided that each sentence falls within the offense's prescribed statutory maximum. Although a court may order the separate sentences imposed for each crime to run concurrently, its decision in this regard is similar to the discretion afforded under section 654, and results in a lessening of the prescribed sentence--not an enhancement. (*People v. White* (2004) 124 Cal.App.4th 1417, 1441, petns. for review filed Jan. 18, 2005, and Jan. 19, 2005.)

B. Imposition of the upper term was not *Blakely* error.

Irrespective of the ultimate resolution of broader questions pertaining to the constitutionality of California's determinate sentencing scheme and judicial decisionmaking about offense-related sentencing factors, imposition of the upper term was not *Blakely* error in this case because the upper term was selected, in substantial part, because of defendant's recidivism. The court cited appellant's numerous prior convictions and his status as a probationer as reasons justifying imposition of the upper term.

Blakely and *Apprendi* both specifically excluded the fact of prior convictions from their holdings. (*Blakely, supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2536]; *Apprendi, supra*, 530 U.S. at p. 490.) The prior conviction exception in *Apprendi* has been broadly

construed to apply to facts relating to defendant's recidivism. (*People v. Thomas* (2004) 91 Cal.App.4th 212, 221-223.)

Since one valid factor in aggravation is sufficient to expose one to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), appellant's sentence is not affected by *Blakely*.

DISPOSITION

The judgments are affirmed.

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Levy, J.

WE CONCUR:

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Dibiaso, Acting P.J.

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Gomes, J.